

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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HAROLD E. GROSS,

Plaintiff,

v.

MEGAN MCCLELLAN.,

Defendant.

Case No. 3:14-cv-00365-MMD-WGC

ORDER ACCEPTING AND ADOPTING
REPORT AND RECOMMENDATION OF
MAGISTRATE JUDGE
WILLIAM G. COBB

I. SUMMARY

Before the Court is the Report and Recommendation of United States Magistrate Judge William G. Cobb (ECF No. 64) ("R&R") relating to Plaintiff's motion for summary judgment ("Plaintiff's Motion") (ECF No. 37). Defendant filed a response, as well as a cross-motion for summary judgment ("Defendant's Motion"). (ECF Nos. 45, 46.) Plaintiff filed a response to Defendant's motion and reply in support of his own motion. (ECF Nos. 55, 56.) Defendant filed a reply in support of her Motion. (ECF No. 57.) Plaintiff then filed a response to Defendant's reply (ECF No. 58), which Defendant moved to strike. (ECF No. 59) Magistrate Judge Cobb properly denied the motion to strike. (ECF No. 63.) The Court has reviewed Plaintiff's objection to the R&R (ECF No. 67) and Defendant's response thereto (ECF No. 68). For the reasons discussed herein, the Court adopts the R&R.

II. BACKGROUND

Plaintiff is an inmate in the custody of the Nevada Department of Corrections. The events giving rise to this action occurred while Plaintiff was housed at Lovelock

1 Correctional Center. (ECF No. 6.) After screening, Plaintiff was allowed to proceed on
2 his Eighth Amendment failure to protect and Fourteenth Amendment due process
3 claims. (ECF No. 10 at 3-6.) The relevant background facts are recited in the R&R,
4 which this Court adopts. (ECF No. 64 at 2, 7-9.)

5 **III. LEGAL STANDARD**

6 **A. Review of the Magistrate Judge's Recommendation**

7 This Court "may accept, reject, or modify, in whole or in part, the findings or
8 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party
9 timely objects to a magistrate judge's report and recommendation, then the court is
10 required to "make a *de novo* determination of those portions of the [report and
11 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). In light of Plaintiffs'
12 objections, the Court has engaged in a *de novo* review to determine whether to adopt
13 Magistrate Judge Cobb's recommendation. Where a party fails to object, however, the
14 court is not required to conduct "any review at all . . . of any issue that is not the subject
15 of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985). Indeed, the Ninth Circuit has
16 recognized that a district court is not required to review a magistrate judge's report and
17 recommendation where no objections have been filed. See *United States v. Reyna-*
18 *Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review employed by
19 the district court when reviewing a report and recommendation to which no objections
20 were made); see also *Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003)
21 (reading the Ninth Circuit's decision in *Reyna-Tapia* as adopting the view that district
22 courts are not required to review "any issue that is not the subject of an objection.").
23 Thus, if there is no objection to a magistrate judge's recommendation, then the court
24 may accept the recommendation without review. See, e.g., *Johnstone*, 263 F. Supp. 2d
25 at 1226 (accepting, without review, a magistrate judge's recommendation to which no
26 objection was filed).

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1 **B. Summary Judgment Standard**

2 “The purpose of summary judgment is to avoid unnecessary trials when there is
3 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
4 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the
5 pleadings, the discovery and disclosure materials on file, and any affidavits “show there
6 is no genuine issue as to any material fact and that the movant is entitled to judgment as
7 a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). An issue is
8 “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-finder could
9 find for the nonmoving party and a dispute is “material” if it could affect the outcome of
10 the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
11 (1986). Where reasonable minds could differ on the material facts at issue, however,
12 summary judgment is not appropriate. See *id.* at 250-51. “The amount of evidence
13 necessary to raise a genuine issue of material fact is enough ‘to require a jury or judge to
14 resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral Corp.*, 718
15 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat’l Bank v. Cities Service Co.*, 391 U.S.
16 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all facts
17 and draws all inferences in the light most favorable to the nonmoving party. *Kaiser*
18 *Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

19 The moving party bears the burden of showing that there are no genuine issues
20 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once
21 the moving party satisfies Rule 56’s requirements, the burden shifts to the party resisting
22 the motion to “set forth specific facts showing that there is a genuine issue for trial.”
23 *Anderson*, 477 U.S. at 256. The nonmoving party “may not rely on denials in the
24 pleadings but must produce specific evidence, through affidavits or admissible discovery
25 material, to show that the dispute exists,” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,
26 1409 (9th Cir. 1991), and “must do more than simply show that there is some
27 metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285 F.3d 764, 783 (9th
28 Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586

1 (1986)). “The mere existence of a scintilla of evidence in support of the plaintiff’s position
2 will be insufficient.” *Anderson*, 477 U.S. at 252.

3 Further, “when parties submit cross-motions for summary judgment, ‘[e]ach
4 motion must be considered on its own merits.’” *Fair Hous. Council of Riverside County,*
5 *Inc. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (quoting William W.
6 Schwarzer, et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D.
7 441, 499 (Feb. 1992) (citations omitted). “In fulfilling its duty to review each cross-motion
8 separately, the court must review the evidence submitted in support of each cross-
9 motion.” *Id.*

10 **IV. DISCUSSION**

11 The Magistrate Judge recommends granting summary judgment on Plaintiff’s due
12 process claim based on Plaintiff’s request to voluntarily withdraw this claim (ECF No. 55
13 at 28). (ECF No. 64 at 5.) The Court will adopt this recommendation.

14 The Magistrate Judge recommends granting summary judgment on Plaintiff’s
15 Eighth Amendment failure to protect claim because the undisputed facts do not show
16 Plaintiff was subjected to conditions of incarceration imposing a substantial risk of
17 serious harm. (ECF No. 64 at 8-13.) In reaching this recommendation, the Magistrate
18 Judge thoroughly examined Plaintiff’s allegations and the evidence offered by the
19 parties; and the Magistrate Judge applied the facts to the law in the Ninth Circuit as
20 established in *Labatad v. Corrections Corp. of America*, 714 F.3d 1155 (9th Cir. 2013).
21 (*Id.*)

22 Under the Eighth Amendment, prison officials have a duty to protect prisoners
23 from violence at the hands of other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 833
24 (1994). To establish a violation of this duty, the prisoner must establish that prison
25 officials were deliberately indifferent to serious threats to the inmate’s safety. *Id.* at 834.
26 “‘Deliberate indifference’ has both subjective and objective components.” *Labatad*, 714
27 F.3d at 1160. The prisoner must show that “the official [knew] of and disregard[ed] an
28 excessive risk to inmate . . . safety; the official must both be aware of facts from which

1 the inference could be drawn that a substantial risk of serious harm exists, and [the
2 official] must also draw the inference.” *Farmer*, 511 U.S. at 837. “Liability may follow only
3 if a prison official ‘knows that inmates face a substantial risk of serious harm and
4 disregards that risk by failing to take reasonable measures to abate it.’” *Labatah*, 714
5 F.3d at 1160 (quoting *Farmer*, 511 U.S. at 847).

6 Plaintiff contends that he has shown Defendant’s knowledge of a substantial risk
7 of serious harm by showing Defendant’s failure to properly screen to ensure Plaintiff, a
8 Jewish inmate, would not be housed with a white supremacist like Parsons. (ECF No. 67
9 at 6-7.) However, as the court in *Labatah* found, the fact that two known rival gang
10 members were placed in the same unit, without more facts supporting an inference of
11 knowledge of substantial risk of harm to the plaintiff, is not sufficient to establish
12 deliberate indifference. *Labatah*, 714 at 1161. Plaintiff also points to his record of being
13 victimized previously to show a rational trier of fact could find him more vulnerable to
14 future attacks by other inmates. (ECF No. 67 at 9-10.) As the Magistrate Judge correctly
15 found, the prior incident at NNC related to Plaintiff being a possible target “due to
16 refusing to tattoo other inmates,” which would not put Defendant on notice of any
17 prospective threat from a white supremacist. (ECF No. 64 at 10-11.)

18 The Magistrate Judge properly examined and addressed each of Plaintiff’s
19 arguments. Having reviewed the records, the Court agrees with the Magistrate Judge’s
20 recommendation to find that Plaintiff fails to establish that Defendant knew of and
21 disregarded a substantial risk of harm to Plaintiff by placing him in the same unit as
22 Parsons. Accordingly, the Court will adopt the R&R and overrule Plaintiff’s objection.

23 **V. CONCLUSION**

24 It is therefore ordered, adjudged and decreed that the Report and
25 Recommendation of Magistrate Judge William G. Cobb (ECF No. 64) is accepted and
26 adopted in full.

27 It is hereby ordered that Plaintiff’s motion for summary judgment (ECF No. 37) is
28 denied.

1 It is further ordered that Defendant's motion for summary judgment (ECF No. 45) is
2 granted.

3 The Clerk is directed to enter judgment in accordance with this Order and close this
4 case.

5 DATED THIS 26th day of September 2016.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE